IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 84

WILLIAM L. GREENE, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Writ of Certiorari to the United States Court of Claims

BRIEF FOR THE PETITIONER

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September 3, 1963.

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BRIEF FOR THE PETITIONER

THE ORDER BELOW

The Court of Claims filed no opinion. Its unreported order of December 20, 1962, denying review of Commissioner Day's order of December 5, 1962, appears in the printed record, together with Commissioner Day's order, at R. 9.

JURISDICTION

The order of the Court of Claims (R. 9), signed by Acting Chief Judge Laramore on December 20, 1962, denied petitioner's request for a review of Commissioner Day's order of December 5, 1962 (R. 9), suspending further proceedings "pending pursuit of administrative remedies by the Department of Defense." Under Rule 37(d)(4) of the Court of Claims Rules, the order of the Commissioner became the order of the Court by virtue of such denial of review.

The petition for a writ of certiorari was filed on March 1, 1963, and was granted on April 22, 1963. 372 U.S. 974. The jurisdiction of this Court rests on 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

1. Does this Court's decision in *Greene* v. *McElroy*, 360 U.S. 474, contemplate and direct that one deprived of a job by Defense Department officials, whose actions were found by this Court to be unauthorized, shall receive monetary restitution for back pay losses in accordance with applicable regulations (Par. 26, Dept. of Defense Directive 5220.6, 20 Fed. Reg. 1553, February 2, 1955) or the Fifth Amendment to the Constitution of the United States?

2. Was it proper for the Court of Claims to suspend, without reaching the merits, a suit for monetary restitution under the aforesaid 1955 regulation and the Fifth Amendment and to remit the plaintiff to further proceedings before the Department of Defense under DOD Directive 5220.6, 25 Fed. Reg. 7523, issued July 28, 1960?

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

This case involves the Fifth Amendment of the United States Constitution; and Department of Defense Directive 5220.6, 20 Fed. Reg. 1553, issued February 2, 1955; and Department of Defense Directive 5220.6, 25 Fed. Reg. 7523, issued July 28, 1960. These are reprinted in pertinent part in the appendix hereto, *infra*.

STATEMENT OF THE CASE

A. Introduction

Prior to April 23, 1953, petitioner William L. Greene was vice-president and general manager of Engineering and Research Corporation (ERCO). On that date he was discharged by ERCO due to revocation of his security clearance by the Department of the Navy. In *Greene* v. *McElroy*, 360 U.S. 474, this Court held that the action of the Department was not validly authorized and that the officials of the Defense Department "were not empowered to deprive petitioner of his job" as they had done; thereafter, the District Court ordered that "any or all rulings, orders, or determinations wherein or whereby plaintiff's security clearance was revoked are hereby annulled and expunged" from all Government records. (R. 3).[1]

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[1] A photocopy of the District Court's order, signed by Judge Keech, appears in Hearings Before the Committee on Un-American Activities, House of Representatives, relating to H.R. 10175, etc. (87th Cong., 2d Sess., 1962), p. 490. The full text of that order reads as follows:

ORDER

Upon the decision of the United States Supreme Court in this case (*Greene* v. *McElroy*, 360 U.S. 474) and the copy of

Petitioner then made formal demand on the Government for monetary restitution for loss of earnings pursuant to the applicable regulation, Section 26 of the Industrial Personnel Security Review Regulation DOD 5220.6, 20 Fed. Reg. 1553 (1955). Restitution was denied. Petitioner accordingly brought this suit in the Court of Claims for loss of earnings, basing his claim on the aforesaid regulation and the Constitution of the United States. (R. 6-7). The Court of Claims, without expressing any view on the merits, entered an order (R. 9) suspending all proceedings before it pending Greene's institution of proceedings before the Department of Defense under a 1960 Regulation adopted following the decision in *Greene* v. *McElroy*. This procedure would require a hearing to determine whether petitioner is *presently* entitled to access clearance, a clearance which petitioner does not need

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the judgment and opinion of the Supreme Court heretofore filed with the clerk of this Court; and

It appearing that counsel for the respective parties have consented hereto, it is hereby

ORDERED that the action of the Secretary of Defense and his subordinates in finally revoking plaintiff's security clearance was and the same is hereby declared to be not validly authorized; and it is further

ORDERED that any or all rulings, orders, or determinations wherein or whereby plaintiff's security clearance was revoked are hereby annulled and expunged from all records of the Government of the United States.

Dated: 12/14, 1959

/s/ R. B. KEECH
United States District Judge

Consented to:

/s/ DONALD B. MACGUINEAS
Attorney for Defendants

/s/ EUGENE GRESSMAN
Attorney for Plaintiff

or want, and, in the event of a favorable determination, empowers the Secretary of Defense *in his discretion* to award restitution. On the other hand, an unfavorable determination as to petitioner's present access clearance would, under the Government's theory, lead to a denial of any and all restitution.

Petitioner seeks review of that order, and a judgment of this Court that his claim is valid, or alternatively, a direction to the Court of Claims to adjudicate the merits of his claim without requiring prior resort to the procedure under the 1960 Regulation.

B. The Facts On Which Petitioner's Claim Is Based

The facts on which petitioner bases his claim may be sketched briefly here, for they are fully narrated in this Court's opinion in *Greene* v. *McElroy*, 360 U.S. 474 at 476-491.

(1) Greene, an aeronautical engineer, began work for ERCO in 1937 and, except for a brief leave of absence, remained with the firm until his discharge in 1953, having risen to be one of its chief executives because of the "excellence of his work", 360 U.S. at 476. ERCO, a firm devoted primarily to developing and manufacturing mechanical and electrical parts, performed classified work for various armed services. In connection with this work, Greene had thrice obtained security clearances, two of them for Top Secret.[2]

[2] On August 9, 1949, petitioner had been given a confidential clearance by the Army. On November 9, 1949, petitioner had been given a top secret clearance by the Assistant Chief of Staff G-2, Military District of Washington. On February 3, 1950, petitioner had been given a top secret clearance by the Air Material Command. All of these clearances were pursuant to industrial security requirements contractually imposed upon ERCO employees.

(2) On December 11, 1951, petitioner was informed by the Army-Navy-Air Force Personnel Security Board (PSB) that "access by you to contract work and information [at ERCO] . . . would be inimical to the best interests of the United States" and that his clearances were being revoked. He was also advised that he could seek a hearing before the Industrial Employment Review Board (IERB), and petitioner took that course of action. Petitioner, with counsel, appeared at hearings before the IERB with respect to certain allegations made about his past associations. The Government presented no witnesses at these hearings and petitioner had no opportunity to confront or question persons who had allegedly made statements adverse to him. On January 29, 1952, on the basis of these hearings and of the confidential reports, the IERB reversed the action of the PSB and informed petitioner and ERCO that petitioner was authorized to work on secret contract work.

(3) On April 17, 1953, following the abolition of the PSB and the IERB, the Secretary of the Navy wrote ERCO that, on a review of the case, he had concluded that petitioner's "continued access to Navy classified security information [was] inconsistent with the best interests of National Security." No hearing preceded this notification. The Secretary further requested ERCO to exclude petitioner "from any part of your plants, factories or sites at which classified Navy projects are being carried out [and] to bar him access to all Navy classified information." ERCO had no choice but to comply with this request and petitioner was in fact discharged by ERCO on April 23, 1953. On October 13, 1953, petitioner was advised that the Navy had requested the Eastern Industrial Personnel Secur-

ity Board (EIPSB) to make a final determination concerning petitioner's status. A hearing before the EIPSB took place on April 28, 1954, again without any confrontation by petitioner of adverse witnesses, if any. Thereafter the EIPSB affirmed the action of the Secretary of the Navy and ruled that granting clearance to petitioner for access to classified information was "not clearly consistent with the interest of national security." On September 16, 1955, petitioner requested review by the Industrial Personnel Security Review Board. On March 12, 1956, petitioner received a letter from the Director of the Office of Industrial Personnel Security affirming the determination of the EIPSB.

(4) In 1954, following the EIPSB determination, petitioner filed a complaint in the United States District Court for the District of Columbia asking for a declaration that the action of the Department of Defense officials in advising ERCO that petitioner could not be employed was illegal and void, for an order restraining Department of Defense officials from acting pursuant to such illegal advice or notification to ERCO, and for an order requiring such officials to advise ERCO that the Secretary of Navy's letter of April 17, 1953, was void. The District Court granted the Government's motion for summary judgment, 150 F. Supp. 958, and the Court of Appeals affirmed, 254 F. 2d 944 (App. D.C.).

(5) Petitioner obtained review of the Court of Appeals judgment in this Court. On June 29, 1959, this Court held that "in the absence of explicit authorization from either the President or Congress [the Secretaries of the armed forces] were not empowered to deprive petitioner of his job in a proceeding in which

he was not afforded the safeguards of confrontation and cross-examination." *Greene* v. *McElroy*, 360 U.S. 474 at 508.

On December 14, 1959, pursuant to the decision and judgment of this Court the District Court ordered "that the action of the Secretary of Defense and his subordinates in finally revoking plaintiff's security clearance was and the same is hereby declared to be not validly authorized" and "that any or all rulings, orders, or determinations wherein or whereby plaintiff's security clearance was revoked are hereby annulled and expunged from all records of the Government of the United States." (R. 3).[3] Thereby expunged were the adverse determinations of the PSB (Dec. 11, 1951), the Secretary of the Navy (April 17, 1953), the EIPSB (May 30, 1954), and the Director of the Office of Industrial Personnel Security (March 12, 1956). Left on the record and in effect were the three security clearances obtained prior to Dec. 11, 1951, and the IREB order of Jan. 29, 1952, authorizing petitioner to work on secret contract work.

C. Petitioner's Attempts to Obtain Restitution From the Defense Department

(1) On December 28, 1959, petitioner made a formal demand on the General Counsel of the Department of the Navy "for monetary restitution from the Department of the Navy and/or the Department of Defense pursuant to Section 26 of the Industrial Personnel Security Review Regulation, 20 Fed. Reg. 1553." (R. 4).

(2) On January 11, 1960, the General Counsel of the Department of the Navy acknowledged the demand

[3] For full text of the District Court order, see footnote 1, *supra*.

and requested that certain dates and financial data be supplied, stating that if such information were supplied the claim would receive "such consideration as it deserves." A statement of Greene's legal position respecting the applicability of Section 26 was also requested. (R. 4).

(3) On April 20, 1960, petitioner supplied the General Counsel of the Department of the Navy with the requested information and statement of legal position. He stated under oath that he had incurred a $49,960.41 loss of earnings from April 23, 1953, the date of his dismissal, up to December 31, 1959. (R. 4).

(4) On January 4, 1961, having been advised that his claim had been forwarded to the Director of the Office of Security Policy of the Department of Defense for final determination, petitioner renewed his claim in a letter addressed to the said Director. Petitioner, understanding that the Director was disposed to deny the claim, also requested an opportunity to know and rebut the legal representations made in support of any disposition to deny the claim. (R. 4).

(5) On February 8, 1961, the said Director responded that Greene might submit in writing any additional material as to his legal position by March 3, 1961. The Director also stated that "this Department is prepared, at his [Greene's] request, to consider his case under the above-mentioned 1960 Review Regulation [Industrial Personnel Access Authorization Review Regulation, DOD Directive 5220.6, dated July 28, 1960] and to take such action as may be necessary to reach a final determination as to whether it is in the national interest to grant him an authorization for access to classified information." (R. 4).

(6) On March 2, 1961, Greene wrote to the said director restating his legal position as to the applicability of Section 26 and declining to request a reconsideration of his case under the 1960 regulation. He therein stated that he could not

> . . . agree to any procedure which might result in a new, adverse determination which could then be used by the Department to bolster the argument that Section 26 does not apply to this case. And such a possible determination—whether made by the Screening Board or the Hearing Board—could arguably have a retroactive effect so as to give the semblance of legality to the clearance revocation dating back to 1953. Quite clearly the Supreme Court determination that this revocation was unlawful is not subject to a subsequent administrative determination that the revocation was lawful. That is particularly true where the purported effect of the latter determination might retroactively destroy a claim for loss in earnings. (R. 5).

(7) On March 16, 1961, the said Director responded by re-emphasizing the Department's "willingness to process the question of Mr. Greene's current eligibility for access authorization under the provisions of the 1960 Review Regulation." (R. 5).

(8) On April 4, 1961, Greene inquired of said Director as to whether, pursuant to Paragraph V.B. 1 of DOD Directive 5220.6, dated July 28, 1960, the Director had authority to reopen the case on his own motion and take such steps as might be deemed necessary to complete reconsideration without a formal request from Greene. (R. 5).

(9) On May 15, 1961, the said Director replied that "As has been indicated previously, this Department

is prepared at Mr. Greene's request to undertake the processing of his case under the July 28, 1960 Review Regulation." (R. 5).

(10) Finally, on June 1, 1961, the Deputy General Counsel of the Department of Navy advised plaintiff that "In accordance with Department of Defense policy, it has been determined by the Department of Defense that Mr. Greene does not qualify for monetary restitution under the provisions of Paragraph 26 and that, therefore, his claim, being premature, cannot be given further consideration at this stage of the administrative proceedings." It was further stated that "the Department of Defense has informed you that it is prepared at Mr. Greene's request to undertake the processing of his case under the July 28, 1960 Review Regulation, and that if he does so request, prompt action will be taken thereon." (R. 5-6).

D. Proceedings in the Court of Claims

Petitioner filed this suit in the Court of Claims on May 7, 1962, alleging the facts stated above, and claiming that he was entitled to monetary restitution "in an amount equal to the salary or pay which he would have earned at the rate he was receiving on the date of his suspension from employment by ERCO less his earnings from other employment."[4] (R. 6). Petitioner based his claim on the Fifth Amendment and Par. 26 of the 1955 Directive. (R. 6-7).

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[4] During the period from April 23, 1953, to April 23, 1962, plaintiff had earnings from other employment in the amount of $[illegible],039.59. During the same period he would have had earnings from employment with ERCO, at the rate he was receiving on the date of his suspension, in the amount of $162,000.00. (R. 6).

The United States did not file an answer within the original allotted time.[5] Before the extended time for filing the answer had elapsed, Commissioner Day *sua sponte* entered an order (R. 9) on December 5, 1962, reading as follows:

> "In view of the action this day by the court in *Stephen L. Kreznar* v. *United States*, No. 47-60, and *Novera Herbert Spector* v. *The United States*, No. 48-60, further proceedings herein are hereby suspended pending pursuit of administrative remedies by the Department of Defense."[6]

The "administrative remedies" referred to, while as yet not pinpointed by the Government, presumably are those in Par. V.C. of the DOD Directive 5220.6, adopted in 1960 following the *Greene* decision. That paragraph states that reimbursement for loss of earnings "may be allowed" following a final administrative determination that access authorization is pres-

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[5] The Government had filed a motion to suspend proceedings on July 5, 1962. (R. 7). Petitioner filed objections thereto, and on September 5, 1962, Commissioner Day denied the motion (R. 8) and granted the Government 30 days to file its answer. The Government's failure to seek review of Commissioner Day's denial of the motion within five days made such action that of the Court of Claims under Rule 37(d)(4) of that court. The Government did not renew its motion. Commissioner Day's order of December 5, 1962, suspending proceedings was *sua sponte*. (R. 9).

[6] The action of the Court of Claims on "this day"—December 5, 1962—in *Kreznar* and *Spector* related to denials of leave to file further petitions for rehearing in light of the September 5 order of Commissioner Day in the instant case (which had become the order of the court, see footnote 5, *supra*) denying the Government's motion to suspend. The similar orders of the Court of Claims in *Kreznar* and *Spector*, suspending proceedings therein until further administrative remedies have been pursued, are the subject of the pending petition for writ of certiorari in No. 85, Oct. Term, 1963.

ently consistent with the national interest and where the prior adverse determination has been found "unjustified." In other words, the 1960 Directive said to be now available to petitioner places three conditions on monetary restitution: (1) a final administrative determination that access clearance is presently consistent with the national interest, (2) an administrative determination that the prior removal of clearance was unjustified, and (3) a favorable exercise of administrative discretion that reimbursement would be justified.

Pursuant to Rule 37 (d)(4) of the Court of Claims,[7] petitioner duly requested review of Commissioner Day's order. Petitioner claimed that the order was inconsistent with this Court's decision in *Greene* v. *McElroy*, 360 U.S. 474, that the doctrine of exhaustion of administrative remedies had no application under these circumstances, and that his right to monetary restitution was vested and immune from administrative disfeasance. (R. 9-14). Petitioner further stated that he "does not need or want any access authorization under the 1960 Directive." (R. 10).

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[7] Petitioner's request for review mistakenly referred to Rule 37(d)(5) of the Court of Claims, an earlier numbering of what is now Rule 37(d)(4). The Government agreed that this discrepancy was of no consequence. (R. 15, n. 1). Rule 37(d)(4) now reads in pertinent part:

> "Every [procedural] order of a Commissioner entered pursuant to subparagraphs (2) or (3) of this paragraph (d) shall become the order of the Court unless within 5 days after the action thereon a dissatisfied party files with the Court a request for review of the Commissioner's action . . . Requests for review may be acted upon by the Chief Judge or a Judge in chambers, or may be assigned for argument before the Court or a Judge designated for that purpose prior to action thereon."

On December 20, 1962, Acting Chief Judge Laramore on behalf of the Court of Claims denied the request for review, thereby under Rule 37 (d)(4) making Commissioner Day's order of suspension that of the Court of Claims.

SUMMARY OF ARGUMENT

This case is an aftermath of, and is controlled by, the decision in *Greene* v. *McElroy*, 360 U.S. 474. The critical and the only holding in that case was that "in the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination." 360 U.S. at 508.

Central to that holding was a recognition that the loss of a job and the deprivation of employment opportunities in a chosen profession, caused by the unauthorized actions of governmental officials, constituted an invasion of petitioner's "property" and "liberty" rights under the Fifth Amendment. The economic losses which petitioner thereby suffered were expressly recognized by the Court.

Since the injury to petitioner's constitutionally protected rights had been so clearly established, the *Greene* decision necessarily contemplated that petitioner would be entitled to what he is now seeking in the instant suit in the Court of Claims—an appropriate measure of monetary restitution for the losses suffered. As Mr. Justice Cardozo once put it, "Illegality established, liability ensues." *Schubert* v. *Schubert Wagon Co.*, 249 N.Y. 253, 256, 164 N.E. 42, 43. Or as this Court held in *United States* v. *Pewee Coal Co.*, 341

U.S. 114, 116-117, reimbursement follows "almost as a matter of course" from a finding of an invasion of a property right. Indeed, this Court in rendering the *Greene* decision was well aware of the just compensation requirements of the Fifth Amendment as well as of the monetary restitution provisions of Paragraph 26 of the 1955 Defense Department Directive. And it is fair to conclude that this Court contemplated that one or both of those means of reimbursement for losses would be available to petitioner.

Petitioner accordingly filed in the Court of Claims a suit for restitution of his established and recognized losses, relying both on the Fifth Amendment and Paragraph 26 of the 1955 Directive. The Court of Claims, however, suspended proceedings pending pursuit by petitioner of further administrative proceedings before the Department of Defense. The proceedings said to be available are those authorized by the 1960 Defense Department Directive, adopted after the petitioner's demand for restitution under Paragraph 26 of the 1955 Directive had been filed.

These new proceedings, however, are totally inadequate and unresponsive to petitioner's demand for restitution under the Fifth Amendment and under Paragraph 26. That demand relates to a vested right to recoupment for damages suffered in the past, a right which is in no way subject to administrative disfeasance at this stage. The proceedings under the 1960 Directive have no bearing upon either the Fifth Amendment claim or the Paragraph 26 claim. In fact, nothing that the Defense Department could now do or say would in any way resolve the issues pending before the Court of Claims. See *Southwestern Sugar Co.* v. *River Terminals Corp.*, 360 U.S. 411, 415.

The 1960 Directive seeks to require the claimant for monetary restitution to have a current access authorization, an authorization which this petitioner does not need or want. It also seeks to precondition the right to restitution upon an administrative reexamination of the prior adverse determinations which led to the employee's discharge. In this case, however, all such adverse determinations have been expunged from Government records by order of the District Court for the District of Columbia on the remand of the *Greene* case from this Court.

Under these circumstances, the doctrine of exhaustion of further administrative remedies is completely inapplicable. Indeed, the doctrine has been urged here only because of a refusal to recognize the critical holding of this Court in the *Greene* case. The Government has repeatedly claimed that this Court did nothing more than uncover a procedural flaw under the 1955 Directive and that the Court in effect remanded the security case to the Defense Department for processing under new, authorized procedures that are more in conformity with due process concepts. Essentially, the Government's position is one of seeking a retrial of petitioner's security charges under amended procedures. In no real sense is such a retrial related to the doctrine of exhaustion of administrative remedies. It only reflects a misunderstanding of the plain words and the contemplation of this Court in *Greene*.

Petitioner does not seek a new access clearance. Nor does he want to relitigate once again the hoary charges first leveled against him many years ago. This is a suit for restitution for losses already suffered. It should be tried by a court, not by a security board. The day of reckoning has already been too long delayed.

The doctrine of exhaustion of administrative remedies should not be abused so as to postpone that day indefinitely.

ARGUMENT

I. THIS COURT IN GREENE v. McELROY, 360 U.S. 474, HELD THAT PETITIONER HAD BEEN ILLEGALLY DEPRIVED OF HIS JOB AND THEREBY CONTEMPLATED THAT HE WOULD RECEIVE MONETARY RESTITUTION FOR BACK PAY LOSSES

The crux of this case lies in the decision of this Court rendered on June 29, 1959, in *Greene* v. *McElroy*, 360 U.S. 474. The long-standing and consistent refusal of the United States to accept the holding and the necessary implications of that decision has led to the current controversy; and that refusal has given birth to the mistaken concept, adopted by the Court of Claims, that petitioner must now exhaust further administrative procedures before achieving eligibility for monetary restitution. A reexamination and analysis of the prior *Greene* decision thus becomes necessary to expose the impropriety of the Government's position and the inapplicability of the exhaustion principle.

It is petitioner's basic position that the express holding in *Greene* is so plain as to admit of no conclusion other than that petitioner is now entitled to monetary restitution without the necessity of additional administrative concern with his past or present access status. To hold as this Court did, 360 U.S. at 508, that the agents of the United States "were not empowered to deprive petitioner of his job," is to resolve the basic consideration in petitioner's entitlement to monetary restitution. Legally, nothing more remains than to compute the dollar amount of that restitution in accordance with accepted procedures, giving due regard to any offsets that the Government may demonstrate.

A. The Issues Presented to This Court by Petitioner in the Prior Case Were Basically in Terms of An Unauthorized and Illegal Deprivation of Employment Rights.

The genesis of the holding in *Greene* v. *McElroy* is to be found in petitioner's original complaint filed in the District Court for the District of Columbia in 1954. The petitioner there sought declaratory relief to the effect that the actions of the governmental agents in advising petitioner's employer (ERCO) that petitioner could no longer be employed be declared illegal and void. See R. 8-9, *Greene* v. *McElroy,* No. 180, October Term, 1958.[8] This requested relief was premised upon the following critical paragraph in the complaint (Par. 18, R. 8):

> As a result of the said illegal arbitrary, unjust and void actions of the defendants as aforesaid, plaintiff has been deprived of his employment, and, as of the date of filing this complaint, has suffered loss of earnings amounting to more than $20,000.00, and will in future continue to suffer loss of earnings and other damages unless the defendants be restrained by orders of this Court and unless the acts of defendants herein complained of be declared by this Court to be illegal, arbitrary, and void. Said injury and damage is irreparable and the plaintiff is without adequate or any remedy at law.

Notable is the fact that no effort was made to obtain a judicial determination that petitioner was entitled to

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[8] As summarized by the Government in its brief before this Court, p. 4, petitioner's suit sought a judgment "(a) declaring the acts of the respondents 'in advising plaintiff's employer that plaintiff could not be employed, illegal, null, void and of no effect;' (b) restraining the respondents from 'doing any act in pursuance of the said illegal declaration that plaintiff is not entitled to be employed by' ERCO; and (c) requiring respondents to advise ERCO that the letter of April 17, 1953, is null and void."

access to classified information or that he was entitled to a security clearance.

In the course of the proceedings in the lower courts the Government denied that it had deprived petitioner of his right to work for ERCO.[9] It advanced the contention that petitioner really was seeking access to classified information, that he had no standing to assert a right to such information and that the denial to him of that right was both authorized and in accordance with due process of law. That essentially was the position adopted by the lower courts in denying petitioner the requested declaratory relief.

When the case came to this Court on certiorari, petitioner again repeated his basic contention that the necessary consequence of the illegal and unauthorized actions of the Defense Department officials was his discharge from employment with ERCO. The questions presented to this Court by petitioner in both his petition and his brief on the merits abounded with references to the alleged invalidity of causing his discharge and the ensuing deprivation of his liberty and property without due process of law. See Questions Presented, Brief for Petitioner, No. 180, October Term, 1958, pp. 2-3. These questions, moreover, were necessarily definable within the bounds of the requested relief, and that relief related solely to a declaration of the invalidity of causing his discharge from employment.

The argument advanced in petitioner's brief expanded, *inter alia*, the proposition that he had been de-

[9] Thus in its brief before the Court of Appeals for the District of Columbia, pp. 15-16, the Government urged that its officials "have not deprived appellant of his right to work for ERCO or any other employer."

prived illegally of his employment rights. It was said, for example, that "the right to contract with reference to one's employment, free of arbitrary interference on the part of governmental authority is one of the most important rights included within the protection of the due process clause." Brief, p. 21. And the deprivation of that right was said to be no less effective or complete when done under the guise of depriving petitioner access to classified information. "In this case, while the government officials have not, in so many words, said that Greene may not work as an aeronautical engineer, they have accomplished that result." Brief, pp. 23-24. "As a practical matter, in Greene's case the loss of employment was inevitable when the clearance was denied." Brief, p. 35, n. 10.

The brief submitted to this Court by the Solicitor General acknowledged (p. 30) "that the withdrawal of petitioner's security clearance operated, as a practical matter, to cause him to lose his position with ERCO, since his lack of access to classified information terminated his usefulness to the company." But the brief insisted that the only power asserted by the Government was its "refusal to disclose to him, a private person, secret military information in its custody and for the protection of which it was responsible." Brief, p. 30. The basic constitutional question was then defined in terms not of the right to employment but of the right to access to classified information. "In its primary form the issue is whether petitioner's interest in access to classified defense information amounts to 'liberty' or 'property' of which he cannot be deprived without due process of law." Brief, p. 29. And in denying that petitioner had any such recognizable interest, the Government sought to create the impression that petitioner's suit was in fact

"one seeking restoration of petitioner's security clearance." Brief, p. 60. The relief he sought, it was said, was "restoration to access to classified information." Brief, p. 22.

Thus were the battle lines drawn in the proceedings before this Court. Petitioner was seeking, as he had from the commencement of his suit, a judicial determination of the invalidity of, or lack of authority for, the governmental actions—including those orders and letters denying him access to classified information—which had led to the loss of his employment with ERCO. Underlying his entire effort was the economic injury which the loss of his job had entailed. And it was that injury, rather than any denial of access to classified information, which motivated his desire for judicial vindication of his right to employment free of unwarranted governmental interference.

The Government, on the other hand, refused to concede that such a vindication was really in issue. While agreeing that the practical impact of the denial of access was the loss of petitioner's job at ERCO, the Government sought to transfer the whole controversy away from employment rights over into the area of security clearances and access eligibility. On this premise, petitioner's loss of a job was merely an incidental consequence of the Government's power to determine who should see and work on classified documents. And petitioner's efforts to vindicate his employment rights were translated into an attempt to secure judicial authorization for access to secret information.

These governmental attempts to minimize petitioner's employment rights in favor of a concentration on the denial of access authorization provide the basic clue to all that has happened subsequent to this Court's

Greene decision. As we shall see, the Government has yet to concede that petitioner's efforts, or this Court's holding in *Greene,* deal with anything more basic than the procedures leading to the past denials of access authorization to petitioner.

B. The Critical and the Only Holding in the Greene Case Was "That in the Absence of Explicit Authorization from Either the President or Congress the Respondents Were Not Empowered to Deprive Petitioner of His Job in A Proceeding in Which He Was Not Afforded the Safeguards of Confrontation and Cross-Examination."

In rendering the decision in *Greene* v. *McElroy,* this Court carefully and narrowly defined the matter to be decided—i.e., "whether the Department of Defense has been authorized to create an industrial security clearance program under which affected persons *may lose their jobs and may be restrained in following their chosen professions* on the basis of fact determinations concerning their fitness for clearance made in proceedings in which they are denied the traditional procedural safeguards of confrontation and cross-examination." 360 U.S. at 493; emphasis added.

The majority of this Court made two essential predicates to the issue as thus narrowly defined:

(1) It recognized that, as the Government had conceded, the revocation of petitioner's security clearance had caused petitioner to lose his job at ERCO and had seriously affected, if not destroyed, his ability to obtain employment in the aeronautics field. And the Court further recognized that "the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment." 360 U.S. at 492.

(2) The Court deemed it unnecessary to resolve the contentions of the Government that (a) the admitted interferences with petitioner's liberty and property rights were indirect by-products of necessary governmental action designed to protect the integrity of secret information, and (b) petitioner had been accorded due process of law consonant with an effective security program. 360 U.S. at 492-493.

In other words, this Court defined the decisive issue in terms of the authorization of the Defense Department officials to deprive petitioner of his job at ERCO and of his ability to follow his chosen profession in the aeronautical field. Significantly, the issue was not cast as one relating only to the authorization for finally denying access to classified information. Nor did the authorization in question concern merely the grant or denial of a security clearance. Rather the Court gave full recognition to petitioner's basic complaint that he had been economically and professionally injured by the actions of the Defense Department officials in denying him access clearance. The authorization to be examined was the authorization to cause that real injury to petitioner's job and employment opportunities. This Court thus was concerned with the ultimate impact of the governmental action, not merely with the clearance procedures which led to that impact.

Being unable to find that either the President or Congress had authorized an industrial security program of this nature, this Court concluded and decided "only that in the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safe-

guards of confrontation and cross-examination." 360 U.S. at 508.

Thereby rejected was any notion that the petitioner was seeking, or was entitled to, a ruling restoring his access authorization. As the special concurring opinion of Mr. Justice Harlan made explicit, "there is nothing in the Court's opinion which suggests that petitioner must be given access to classified material." 360 U.S. at 510.[10] The *Greene* decision is simply a determination that the procedures, the rulings and the denials of security clearance which led to the destruction of petitioner's job opportunities were without proper executive or legislative authorization. And to make that determination effective, the ensuing order of the District Court expunged from government records "any or all rulings, orders, or determinations wherein or whereby plaintiff's security clearance was revoked," after declaring that "the action of the Secretary of Defense and his subordinates in finally revoking plaintiff's security clearance was . . . not validly authorized." Thereby revoked and expunged were the various orders which were later described by this Court as having been "in the nature of adjudications affecting legal rights," and as having "a significant impact upon his employment." *Hannah* v. *Larche*, 363 U.S. 420, 451, 452.

The major factor now relevant that emerged from the *Greene* decision was the unconditional recognition that petitioner had in fact been injured with respect to his employment and his profession. And it is that recognition that becomes the controlling consideration in the present litigation.

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[10] Petitioner in fact has never been given access to classified information at any time subsequent to this Court's *Greene* decision. He has never sought such access authorization and does not need it in his present occupation.

C. Having Recognized Petitioner's Economic Injury, This Court in the Greene Case Necessarily Contemplated That He Would Be Entitled to An Appropriate Measure of Monetary Restitution.

The injury to, and the destruction of, petitioner's employment opportunities resulting from the Government's unauthorized actions were uppermost in this Court's ruling in the *Greene* case. Such injury and destruction were the central core around which the other aspects of the decision revolved. Once the illegality or lack of authorization of the governmental actions became established, the right to some form of restitution for the losses suffered became clear. As Mr. Justice Cardozo once put it, "Illegality established, liability ensues." *Schubert* v. *Schubert Wagon Co.*, 249 N.Y. 253, 256, 164 N.E. 42, 43. A wrong having been brought to light, "There can be no stopping after that until justice has been done." *Bemis Bros. Bag Co.* v. *United States*, 289 U.S. 28, 36.[11]

Petitioner's entitlement to some form of monetary restitution for injuries suffered was not, of course, directly involved in the prior *Greene* decision. That case concerned only the primary illegality of the actions causing the injuries; monetary damages were necessarily left to another day and another forum. But it is unrealistic to assume that this Court, having noted the injuries and the illegal causation, did not contemplate that petitioner would be eligible for restitution for past losses. Such an assumption would be contrary to the general policy of the law, noted above, that recognizes liability for an established illegality.

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[11] "There will be only partial attainment of the ends of public justice unless retribution for the past is added to prevention for the future." Mr. Justice Cardozo, dissenting in *Jones* v. *S.E.C.*, 298 U.S. 1, 30.

Indeed, the considerations that were actually before this Court at the time of the *Greene* decision included the availability of monetary relief for the losses suffered by petitioner. In the companion case, *Taylor* v. *McElroy*, 360 U.S. 709, argued immediately prior to *Greene*, the Government urged that the matter was moot because, after certiorari had been granted, the Secretary of Defense had determined that Taylor was eligible for access clearance and had expunged all adverse determinations. The Solicitor General stated orally, in response to a question from the Bench, that Taylor was "eligible under applicable regulations for compensation for wages lost during the time he was unemployed due to the clearance revocation and denial." 360 U.S. at 711. This representation, which was accepted by the Court in agreeing that the case was moot, was necessarily based on Paragraph 26 of the 1955 Defense Department Directive,[12] one of the bases for Greene's claim in the instant proceeding. Greene and Taylor had sought the same relief in their District Court complaints and the mootness issue turned on whether the Government had afforded Taylor sufficiently complete relief that he would not be disadvantaged by failure to get an appropriate order from the District Court. Neither the Solicitor General nor Assistant Attorney General Doub (who argued the *Greene* case) gave any hint that in the event of a judgment favorable to him, on the issues raised, Greene

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[12] Paragraph 26 provides in pertinent part as follows:

"In cases where a final determination is favorable to a contractor employee, the department whose activity originally forwarded the case to the Director will reimburse the contractor employee in an equitable amount for any loss of earnings during the interim resulting directly from a suspension of clearance."

would not be eligible for compensation under the same Paragraph 26.[13]

Further explicit evidence that the Court intended or understood that its decision would result in monetary reimbursement to Greene is the dissenting opinion of Mr. Justice Clark, who objected that the *Greene* decision "subjects the Government to multitudinous actions—and perhaps large damages—by reason of discharges made pursuant to the present procedures", 360 U.S. 474, 510 at 523-24.[14] Neither the majority opinion nor the concurrence of Mr. Justice Harlan contradicted Mr. Justice Clark's assertion regarding the Government's potential liability.

If the Court had not intended this result it is highly likely that it would have said so, since the reimbursement program of Paragraph 26 was discussed in the Court's opinion (360 U.S. at 504-505) in connection with the Government's contention that Congress had ratified the program. The Government had relied on Hearings Before the House Committee on Appropriations on Department of Defense Appropriations for 1958, 84th Cong., 1st Session, pp. 774-781. In the course of those hearings the following colloquy occurred:

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[13] While the transcript of the oral argument is not available to petitioner, the recollection of counsel on this matter is supported by the report of the argument at 27 U.S. Law Week 3275-3280.

[14] Earlier in his opinion Mr. Justice Clark had written: "But the action today may have the effect of by-passing that exemption since Greene will now claim, as has Vitarelli, see *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959), reimbursement for his loss of wages. See *Taylor* v. *McElroy*, *post*, p. 709. This will date back to 1953. His salary at that time was $18,000 a year." This prediction has come true, Greene's present back-pay claim involves the fact that he received $18,000 a year from the job of which he was deprived.

> MR. WHITTEN: "What basis would there be for us paying him anything? There is no relationship which puts any responsibility upon the Federal Government."
>
> GENERAL MOORE [Special Assistant to the Comptroller, Department of Defense]: "There is certainly, I believe, one of equity and justice. These employees that we are talking about being relieved, even though temporarily, are being relieved at the suggestion of representatives of the Federal Government." (id. at 777.)

This testimony cannot have escaped the Court's attention, since the opinion in *Greene* evinces a careful study of these hearings.[15]

This Court was thus made fully aware of the existence and availability of the monetary restitution provisions of Paragraph 26 of the 1955 Defense Department Directive. And it was cognizant of the Defense Department's stated objective of achieving "equity and justice" through the application of Paragraph 26. Combined with the representations made by the Solicitor General in the *Taylor* case, these factors make it fair to conclude that in holding that petitioner Greene had been improperly deprived of his job this Court necessarily contemplated that he would receive appropriate "equity and justice" in accordance with the reimbursement provisions of Paragraph 26.

To assert that the *Greene* holding has no bearing upon petitioner's right to be made whole is to ascribe

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[15] See particularly 360 U.S. at 505, n. 30, stating that a certain passage in the testimony at those hearings was the "*only* description made to the Committee concerning the procedures used in the Department's clearance program." [Emphasis added.] Such a statement presupposes an examination of the entire testimony. The Government's brief had cited, but not discussed, this testimony. Brief for the United States, No. 180, Oct. Term, 1958, p. 27, n. 8.

to this Court an advisory and gratuitous discussion about petitioner's loss of employment opportunities and the factors that caused that loss. But once it is conceded, as it must be, that the *Greene* decision explicitly held that petitioner was deprived of his job opportunities by virtue of the unauthorized governmental actions, relevant constitutional and legal considerations compel the recognition of the right to restitution in some form. Cf. *United States* v. *Pewee Coal Co.*, 341 U.S. 114, 116-117.[16] Having taken and destroyed petitioner's property right in his job at ERCO, having destroyed his employment opportunities in his chosen profession, the United States became liable under the Fifth Amendment to the Constitution to pay just compensation for the losses suffered. "The guiding principle of just compensation is reimbursement to the owner for the property interest taken." *United States* v. *Virginia Electric Co.*, 365 U.S. 624, 633; and see *Brooks-Scanlon Corp.* v. *United States*, 265 U.S. 106, 123; *Lynch* v. *United States*, 292 U.S. 571, 580. To the extent that Paragraph 26 reflects the Defense Department's desire to achieve "equity and justice," it conforms to the purpose of the Fifth Amendment's guarantee of just compensation—i.e., "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49.

With Paragraph 26 plainly before it and with the requirement of the Fifth Amendment clearly in mind,

[16] In the *Pewee* case, this Court held that from the recognition given the Government seizure of the coal mines in the prior decision in *United States* v. *United Mine Workers*, 330 U.S. 258, it followed "almost as a matter of course" that the Government "took" the Pewee coal property, and, having thus taken Pewee's property, "the United States became liable under the Constitution to pay just compensation."

this Court in *Greene* ruled that petitioner had been improperly deprived of property rights. The intent and the command of the *Greene* decision must therefore include the requirement that restitution in some form—under Paragraph 26, if not under the Fifth Amendment—be forthcoming to compensate petitioner for his acknowledged losses.[17]

D. Nothing in the Greene Decision Destroyed or Affected the Applicability of the Reimbursement Provisions of Paragraph 26 of the 1955 Defense Department Directive.

The ruling in *Greene* in no way undermined the propriety or applicability of Paragraph 26 of the 1955 Defense Department Directive. Despite the lack of authority for many of the procedural sections of that Directive, this Court gave no indication that Paragraph 26, which it directly invoked in the companion *Taylor* case, was in any degree invalidated or unauthorized. To the extent that it permits the recovery of some or all of the compensation to which petitioner became entitled, Paragraph 26 remains in full force with respect to the claim asserted thereunder.

Nor can it be said that the cancellation of the 1955 Directive by the 1960 Defense Department Directive, a cancellation motivated by the *Greene* decision, in any sense erased the applicability to petitioner's claim of Paragraph 26 of the 1955 Directive. That claim was vested and filed prior to the purported repeal of Paragraph 26. Shortly after the District Court entered the

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[17] It is for this reason that petitioner's suit in the Court of Claims is grounded on both Paragraph 26 and the Fifth Amendment. Thereby invoked is that tribunal's jurisdiction to consider claims founded either on the Constitution or on a regulation of an Executive Department. 62 Stat. 940, 28 U.S.C. § 1491.

final order of expungement on the remand of the case from this Court, petitioner made a formal demand of the Government for restitution under Paragraph 26. See R. 4. The date of that demand was December 28, 1959, exactly seven months prior to the promulgation of the 1960 Directive. Serious questions relative to the validity of the 1960 Directive would arise were it considered to be retroactive so as to preclude consideration of claims filed under the 1955 Directive prior to repeal. Such considerations make necessary the conclusion that Paragraph 26 is still available as a means of granting petitioner the restitution which the *Greene* decision contemplated.

Moreover, Paragraph 26, properly interpreted, clearly permits restitution thereunder for the losses which this Court found had been suffered by petitioner. It provides in essence that in cases "where a final determination is favorable to a contractor employee" reimbursement will be allowed "in an equitable amount for any loss of earnings during the interim resulting directly from a suspension of earnings." Nothing in Paragraph 26 requires that that "final determination" be an administrative one; it is enough if the determination is by someone authorized to make final determinations. Cf. Paragraph V.C. of the 1960 Directive, requiring a "final administrative determination."

The opinion and judgment of this Court in *Greene*, supplemented by the District Court's order annulling and expunging "any or all rulings, orders or determinations wherein or whereby plaintiff's security clearance was revoked," plainly was "a final determination . . . favorable to a contractor employee" within the scope of Paragraph 26. Addition-

ally by expunging all the adverse determinations—including the crucial April 17, 1953, letter from the Secretary of the Navy to ERCO—the District Court in effect reinstated the prior "final" administrative determination favorable to petitioner, a determination rendered in January of 1952 by the IERB.[18] Judicial action thus resulted—for purposes of Paragraph 26—in a "final determination" favorable to *Greene*, as well as in a resurrection of a prior final and favorable administrative determination. Both of these final determinations must be considered applicable to the entire interim period of the improper suspension of clearance.[19]

Paragraph 26 of the 1955 Directive thus stands as the appropriate method of giving effect to the necessary consequence of the *Greene* decision. It is the method which this Court was given to understand would be available to make petitioner at least partly whole for the losses suffered during the period of the unauthorized job deprivation. The Court of Claims is there-

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[18] "On January 29, 1952, the IERB, on the basis of the testimony given at the hearing and the confidential reports, reversed the action of the PSB and informed petitioner and ERCO that petitioner was authorized to work on Secret contract work." *Greene* v. *McElroy*, 360 U.S. at 480. This 1952 determination stemmed from the same security charges against petitioner as led to the later adverse determinations that have been expunged.

[19] To interpret the phrase "final determination" as it appears in Paragraph 26 to mean only a new and subsequent administrative grant of clearance would deny the "equity and justice" promised by the Defense Department in establishing the reimbursement provisions. And it would leave completely unanswered the just compensation claim under the Fifth Amendment. The result would be at odds with this Court's understanding that petitioner's losses, like those of Taylor's, would be compensable under Paragraph 26.

fore duty bound to proceed at once to compute the precise amount of reimbursement due petitioner under Paragraph 26.

II. PETITIONER'S RIGHT TO RECEIVE MONETARY RESTITUTION DOES NOT NOW DEPEND UPON THE EXHAUSTION OF ANY NEW OR ADDITIONAL SECURITY CLEARANCE PROCEEDINGS

The order of the Court of Claims suspending further proceedings in this case "pending pursuant of administrative remedies by the Department of Defense," R. 9, reflects a failure to understand and abide by the necessary import of this Court's decision in *Greene* v. *McElroy*, 360 U.S. 474. As already indicated, this Court has determined that petitioner has suffered a loss of property rights in being illegally deprived of his job opportunities. From that determination it follows "almost as a matter of course," cf. *United States* v. *Pewee Coal Co.*, 341 U.S. 114, 116-117, that petitioner is entitled to reimbursement for his losses without further administrative ado.

Yet the notion persists, as perpetuated by the Government and incorporated in the Court of Claims order, that petitioner may yet obtain monetary restitution for his past losses without resort to judicial proceedings "if it is administratively determined [under the 1960 Directive] that he is entitled to access authorization."[20] Somehow it is thought that if petitioner were now to be denied access authorization in accordance with the new procedures the whole of the *Greene* decision could be avoided and petitioner's losses could be relegated to the maxim *damnum absque injuria;* on

[20] Brief for the United States in Opposition to Petition herein, p. 7.

the other hand, if petitioner were now to gain an access authorization which he does not need or want and if it were determined that the prior administrative denials of clearance were unjustified, reimbursement of loss of earnings might then be considered. Such legerdemain flouts both the holding of the *Greene* decision and the basic purposes of the administrative exhaustion principle.

A. The Insistence That Petitioner Exhaust Further Administrative Remedies As A Condition to His Right to Monetary Restitution Misconceives the Greene Decision and the Nature of Petitioner's Present Claim.

The order below requiring petitioner to pursue further administrative proceedings is traceable to the consistent contention of the Government that the *Greene* decision of this Court related to nothing more than "a procedural infirmity in the hearing which preceded the final revocation of the security clearance."[21] To the Government, the decision has meant only that the Department of Defense was required to revise its procedures in order to conform to this Court's judgment. Thus viewed, the *Greene* decision merely uncovered a procedural error in the handling of the case within the Defense Department and the case has in effect been remanded to that Department for retrial in accordance with revised procedures.[22] It is a retrial

[21] Brief for the United States in Opposition to Petition herein, pp. 6-7.

[22] Such was precisely the effect ascribed to the *Greene* decision by the Government in response to the plaintiff's motion for summary judgment in *Kreznar* v. *United States*, Ct. Cl. No. 47-60, now pending on petition for writ of certiorari, No. 85, Oct. Term, 1963, See pp. 109-110 of the *Kreznar* record on file with the Clerk of this Court.

of the security charges against petitioner that the Government now seeks, a retrial clothed in the language of exhaustion of administrative remedies.

Such an analysis of the *Greene* decision is impermissible, for it ignores the central thrust of this Court's action. The infirmities, the lack of proper authorization, found by this Court all related to procedures which caused petitioner to lose his job and his employment opportunities. The entire focus of the *Greene* decision was on the deprivation of his job and employment rights by virtue of an unauthorized procedure lacking the safeguards of confrontation and cross-examination. See *Hannah* v. *Larche,* 363 U.S. 420, 451, 452.

Such focus has never been acknowledged or accepted by the Government. It has repeatedly attempted to read the *Greene* decision as though the only concern was with faulty security clearance procedures rather than with the resulting deprivation of constitutionally protected rights.[23] This effort to revise the *Greene* ruling was dramatically illustrated in the Government's Brief in Opposition to the Petition for Certiorari, p. 3, which rewrote the critical holding so as to make it appear that this Court only held that peti-

[23] In so reading the decision, the Government merely echoes the original arguments it advanced to this Court in the *Greene* case, arguments which steadfastly ignored petitioner's claim that his constitutionally protected employment rights had been violated by the illegal and unauthorized action of the Government.

Thus, in arguing that petitioner was really seeking an order requiring the disclosure to him of Government secrets, the Government asserted that any such order "would, of course, leave open to the Government the alternative of revoking the clearance again . . . in proceedings meeting the requirements of this Court's decision." Brief for the United States, p. 48, No. 180, Oct. Term, 1958.

tioner could not be finally deprived of his security clearance by means of the unauthorized procedures.[24]

Such a translation of the *Greene* holding serves to explain the emergence of the administrative exhaustion concept in this case. By completely divorcing this Court's ruling from any determination of a denial of petitioner's constitutionally protected property rights, the semblance of an exhaustion argument can be erected.

The starting premise, of course, is a stultifying reading of the *Greene* opinion to relate it solely to a correctible procedural defect—the lack of authority for a procedure finally depriving one of his security clearance. The correction of that defect then becomes possible through the creation of the hitherto missing authority and the promulgation of more palatable procedures as to confrontation and cross-examination. And since the *Greene* ruling did not say that petitioner was entitled to a security clearance or to access to classified documents, petitioner must now exhaust the new

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[24] The nature of this attempted revision was as follows:

This Court's holding, 360 U.S. at 508:	The Government's revision, Brief in Opp., p. 3:
"We decide only that in the absence of explicit authorization from either the President or Congress *the respondents were not empowered to deprive petitioner of his job* in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination." [Emphasis added.]	"On June 29, 1959, this Court held that, 'in the absence of explicit authorization from either the President or Congress', *petitioner could not be finally deprived of his security clearance* 'in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination.' *Greene* v. *McElroy*, 360 U.S. 474, 508." [Emphasis added.]

procedures of the 1960 Directive. If he thereby obtains such clearance or access, petitioner would then be considered eligible to apply for monetary restitution under Paragraph V.C. of the 1960 Directive.

The alien nature of this exhaustion argument is at once obvious. It totally ignores the central consideration of the *Greene* ruling—the established deprivation of petitioner's employment rights and opportunities. It gives no recognition to the fact that petitioner is seeking restitution for past losses, losses which were due to the past illegalities of the Government agents. And it makes the securing of present access clearance a predicate for reimbursement for losses suffered from an improper denial of clearance in the past.

The short of it is that the *Greene* decision, construed to mean what it plainly says, renders completely irrelevant and unnecessary the effort to force petitioner to obtain a new and unwanted security clearance as a condition precedent to his right to monetary restitution for past losses.

B. The Doctrine of Exhaustion of Administrative Remedies Is Totally Inapplicable Where, As Here, the Remedies Afford No Relief Commensurate with Petitioner's Claim and Concern Irrelevant Matters.

Petitioner's claim for monetary restitution was made under Paragraph 26 of the 1955 Directive. On June 1, 1961, petitioner was informed that "it has been determined by the Department of Defense that Mr. Greene does not qualify for monetary restitution under the provisions of Paragraph 26." R. 5-6. Petitioner was simultaneously advised that, upon request, the Department would "undertake the processing of his case under the July 28, 1960 Review Regulation." R. 6.

But the availability of a processing of the case under the 1960 Directive is without relation to the matters involved in the Paragraph 26 claim, which has been finally denied by the Department of Defense. The Paragraph 26 claim, as well as that made under the Fifth Amendment, seeks reimbursement for the losses incurred in the past. No claim is made for restitution under Paragraph V.C. of the 1960 Directive.

The emptiness of the requirement that petitioner now proceed before the Defense Department under the 1960 Directive becomes clear. Petitioner's claim for relief in the Court of Claims presents no question of fact (except for the calculation of the amount due) and but two questions of law: (1) whether he has a right to reimbursement under Paragraph 26 of the 1955 Directive; and (2) whether he has a just compensation claim under the Fifth Amendment. Further proceedings before the Defense Department would shed no light on either question, the Department already having denied the Paragraph 26 claim and plainly being without power to treat the constitutional issue.

The situation here finds precise parallel in the decision in *Southwestern Sugar Co.* v. *River Terminals Corp.*, 360 U.S. 411. There it was held erroneous for a Court of Appeals to remit the parties to an administrative determination of one issue when the case might have been finally disposed of by judicial resolution of any one of three other issues that were "plainly ripe for decision." To paraphrase and apply to this case the reasoning of the *Southwestern* opinion, 360 U.S. at 415, if the Defense Department were to conclude that petitioner was not entitled to restitution under the 1960 Directive, the Court of Claims "would then have to decide the very questions

which it can now decide without the necessity for any collateral proceeding." Conversely, a present ruling by the Court of Claims in petitioner's favor "might entirely obviate the necessity for proceedings" before the Department, proceedings "which would further delay the final disposition of this already protracted litigation."

In these circumstances, where the suggested administrative relief is unresponsive to the dispositive issues pending in the Court of Claims and where the Department of Defense can offer no aid in the resolution of those matters, "sound and expeditious judicial administration" compels the Court of Claims to proceed to render judgment without reference to the possibility of proceedings under the 1960 Directive. *Southwestern Sugar Co.* v. *River Terminals Corp., supra,* 415. The administrative exhaustion doctrine was never designed to withhold judicial action while the parties pursue irrelevant, unresponsive and dilatory administrative procedures. See *Smith* v. *Illinois Bell Tel. Co.*, 270 U.S. 587, 591; *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, 63; *Public Utilities Comm. of California* v. *United States*, 355 U.S. 534, 539-540.[25]

Not only is the proffered procedure unresponsive to the matters *sub judice* in the Court of Claims but the matters offered to be resolved by the Defense Department are either moot or illusory:

(1) To the extent that a security board would inquire into and determine petitioner's present eligibility for access authorization, such a determination

[25] See, generally, Jaffe, *The Exhaustion of Administrative Remedies*, 12 Buff. L. Rev. 327, 329-334 (1963); 3 Davis, *Administrative Law Treatise* § 20.07 (1958).

would be a gratuitous declaration unrelated to any real need or eligibility for such authorization. Petitioner does not need or want access authorization and, not being employed by a Defense contractor, is not eligible to apply for an access authorization. The rendering of what amounts to an advisory opinion on access eligibility can hardly be elevated into the category of administrative remedies required to be exhausted. Denial or absence of present access authorization is clearly consistent with payment for losses resulting from improper or unauthorized revocation of past access clearance.[26]

(2) To the extent that a security board would reexamine and review the earlier adverse determinations, in furtherance of the provision in Paragraph V.C. of the 1960 Directive that reimbursement depends in part upon a finding "that the administrative determination which resulted in the loss of earnings was unjustified," such reexamination has been mooted. The prior adverse determinations have all been ordered expunged from the records of the Government. There is literally nothing in those records which would permit such a reexamination.

This "offer" to reopen and reexamine adverse determinations which this Court found were unauthorized and which the District Court ordered expunged underscores the illusory nature of the administrative exhaustion contention in this case. It is nothing more

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[26] Reinstatement to the position from which a Government employee was discharged is not a condition precedent to recovery of back pay for a wrongful discharge. *Gadsden* v. *United States*, 111 Ct. Cl. 487, 78 F. Supp. 126; *Watson* v. *United States*, 162 F. Supp. 755 (Ct. Cl.); *Feldman* v. *United States*, 181 F. Supp. 393, 399 (Ct. Cl.).

than an attempt, by a combination of reopening the old determinations and passing upon present access eligibility, to rehear and retry the old security charges under amended procedures. The administrative exhaustion doctrine, properly viewed, has never required one to seek such a rehearing or retrial. "As the law does not require an application for a rehearing to be made and its granting is entirely within the discretion of the Commission, we see no reason for requiring it to be made a condition precedent to the bringing of a suit to enjoin the enforcement of the order." *Prendergast* v. *New York Tel. Co.*, 262 U.S. 43, 48. See also, *United States* v. *Abilene & S. R. Co.*, 265 U.S. 274; *Levers* v. *Anderson*, 326 U.S 219.[27]

(3) Additionally, the purported remedy before the Defense Department is by its own terms discretionary. Even if it were determined that access authorization was presently permissible and even if the prior expunged determinations were found to be unjust, Paragraph V.C. of the 1960 Directive states that reimbursement "may be allowed" if the claim is "administratively determined to be just and equitable." Such discretionary relief need not be pursued and is inadequate to oust the duty of the Court of Claims to proceed to adjudicate the matters pending before it. *Smithmeyer* v. *United States*, 147 U.S. 342, 357-358; see also *Moore* v. *Illinois Central R. Co.*, 312 U.S. 630, 635-636.

(4) If petitioner were to proceed as suggested before the Department of Defense and if the Depart-

[27] And see § 10(c) of the Administrative Procedure Act, 5 U.S.C. § 1009, providing that agency action otherwise ripe for judicial review "shall be final for the purposes of this subsection whether or not there has been presented or determined any application for . . . any form of reconsideration."

ment were to resolve any issue against him, thereby precluding him from restitution under the 1960 Directive, he would be seriously prejudiced in his suit in the Court of Claims. It would appear to be the logic of the Government's position that instituting a proceeding under the 1960 Directive would be deemed a waiver of rights under the 1955 Directive, particularly Paragraph 26 thereof. Having invoked the provisions of the 1960 Directive, petitioner could be said to have made a final choice to accept all the benefits and risks thereunder. Suffice it to say that such a possible result is not among the considerations warranting invocation of the administrative exhaustion doctrine.

In fact, to the extent that it is relevant, the administrative exhaustion doctrine has been more than amply respected in this prolonged proceeding. The security proceedings before the Department of Defense were prolix and extensive, and they resulted in a final determination as to petitioner's security clearance.[28] Lengthy court proceedings then ensued, resulting in this Court's decision in 1959. Petitioner, immediately after the entry of the District Court order on remand, made demands upon the Defense Department for monetary restitution under Paragraph 26 of the 1955 Directive. For nearly a year and a half the Department kept the demands under consideration, finally rejecting them on June 1, 1961. R. 5-6.

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[28] In paragraph 17 of petitioner's original complaint in the District Court, it was alleged that he had "exhausted all administrative remedies available to him." R. 8, No. 180, Oct. Term, 1958. The Government's original answer admitted that allegation, R. 16, although its amended answer denied it "in that plaintiff was allowed under the regulations to make a motion for reconsideration." R. 26, No. 180, Oct. Term, 1958.

Now to be met with offers and demands that petitioner seek further administrative relief is to entertain an abuse of the administrative exhaustion principle. This Court, having studied the record of petitioner's previous security hearings,[29] and of other similar hearings as well,[30] will readily understand why petitioner is unwilling to endure another round. Apart from their procedural inadequacies, such hearings violently intrude into the individual's privacy, subjecting his entire life to hostile scrutiny. There is no need to consider here whether they are a necessary and proper price for the preservation of government secrets. Petitioner does not seek access clearance. This is a suit for money. It should be tried by the courts, not by a security board.

CONCLUSION

By reason of the foregoing, the order of the Court of Claims should be vacated or reversed and that tribunal should be directed to proceed with the computation of the restitution clearly due the petitioner.

Respectfully submitted,

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September 3, 1963.

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[29] Proceedings of January 23, 1952 before the Industrial Employment Review Board, Transcript of Record, No. 180, Oct. Term, 1958, pp. 39-171; proceedings of April 28, 29, 30, 1954 before the Eastern Industrial Personnel Security Board, *Ibid.*, pp. 184-461.

[30] See, e.g., *Vitarelli* v. *Seaton*, 359 U.S. 535, particularly note 5, pp. 542-544.

APPENDIX

United States Constitution, Amendment V:

> No person shall be * * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Department of Defense Directive 5220.6, 20 Fed. Reg. 1553, issued February 2, 1955: * * * par. 26:

> *Monetary Restitution.* In cases where a final determination is favorable to a contractor employee, the department whose activity originally forwarded the case to the Director will reimburse the contractor employee in an equitable amount for any loss of earnings during the interim resulting directly from a suspension of clearance. Such amount shall not exceed the difference between the amount the contractor employee would have earned at the rate he was receiving on the date of suspension and the amount of his interim net earnings. No contractor employee shall be compensated for any increase in his loss of earnings caused by his voluntary action in unduly delaying the processing of his case under this regulation.

Department of Defense Directive 5220.6, 25 Fed. Reg. 7523, issued July 28, 1960:

> V. *Miscellaneous*
>
> * * * B. *Reconsideration of Prior Decisions* * * *
> 1. Decisions rendered under any industrial personnel review program prior to the effective date of this Regulation which denied or revoked an access authorization may be reconsidered by such boards as the Director deems appropriate at the request of the applicant, addressed through the Director, after a finding by the appropriate board that there is newly dis-

covered evidence or that other good cause has been shown. Whenever a final determination of denial or revocation based upon a personal appearance proceeding is found to have been unauthorized at the time it was made, authority is hereby delegated to the Director, Office of Industrial Personnel Access Authorization Review, to vacate such final determination and all subsequent administrative action predicated thereon and to take such other steps as may be deemed necessary to complete reconsideration of the case.

* * * *

C. Monetary Restitution.

If an applicant suffers a loss of earnings resulting directly from a suspension, revocation, or denial of his access authorization, and at a later time a final administrative determination is made that the granting to him of an access authorization at least equivalent to that which was suspended, revoked or denied, would be clearly consistent with the national interest and it is determined by the board making a final favorable determination that the administrative determination which resulted in the loss of earnings was unjustified, reimbursement of such loss of earnings may be allowed in an amount which shall not exceed the difference between the amount the applicant would have earned at the rate he was receiving on the date of suspension, revocation, or denial of his access authorization and the amount of his interim net earnings. The filing and processing of any such claim shall be in accordance with such regulations as the Secretary of Defense may prescribe after consultation with the Administrators. Payment shall be limited to claims administratively determined to be just and equitable. No applicant shall be compensated for any increase in his loss of earnings caused by his voluntary action in unduly delaying the processing of his case under any industrial personnel

review program. Payment under this provision shall be in full satisfaction of any and all claims, of whatever nature they may be, which the applicant has or may assert against the United States, or the Department of Defense or any of its agencies or activities, or the Federal Aviation Agency, or the National Aeronautics and Space Administration, or any of them, by reason of or arising out of the suspension, revocation or denial of access authorization.